

1
2 IN THE UNITED STATES DISTRICT COURT
3

4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 LARRY DEAN PETERSON, No. C 07-04069 CW (PR)

6 Petitioner,

ORDER DENYING MOTION TO
DISMISS; STAYING HABEAS
PROCEEDINGS; DIRECTING
PETITIONER TO FILE QUARTERLY
STATUS REPORTS; AND DIRECTING
CLERK TO CLOSE THIS CASE
ADMINISTRATIVELY UNTIL THE
COURT ISSUES ORDER LIFTING STAY

7 v.

8 KEN CLARK, Warden,

9 Respondent.

10 _____ / (Docket no. 5)
11

12 INTRODUCTION

13 On August 8, 2007, Petitioner Larry Peterson, a state prisoner
14 incarcerated at the California State Prison - Corcoran, filed a pro
15 se petition for a writ of habeas corpus pursuant to 28 U.S.C.
16 § 2254. On April 8, 2008, Respondent Ken Clark filed a motion to
17 dismiss for untimeliness. Petitioner filed an opposition on May
18 12, 2008. Respondent filed a reply on October 14, 2008. For the
19 reasons set forth below, the Court DENIES Respondent's motion to
20 dismiss.

21 BACKGROUND

22 In 2004, following a jury trial, Petitioner was convicted of
23 two counts of lewd acts on children under the age of fourteen. The
24 trial court also found a prior attempted kidnaping conviction and
25 certain criminal allegations against Petitioner to be true. He was
26 sentenced to twenty-one years to life imprisonment.

27 Petitioner challenged his conviction in the California Court
28 of Appeal where it was affirmed on June 16, 2005. (Resp't Ex. A.)

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1 On July 22, 2005, Petitioner filed a petition for review in the
2 California Supreme Court.¹ This petition was denied on August 24,
3 2005. (Resp't Ex. C.) However, Petitioner claims that he never
4 received a copy of the state supreme court's decision; thus, he was
5 unaware that his petition for review had been denied on August 24,
6 2005. (Opp'n at 1.) According to Petitioner, "[a]fter recovering
7 from a heart attack, [he] made several attempts to find out the
8 status of [his] appeal."² (Id.)

9 On December 8, 2005, Petitioner wrote a letter to his
10 appellate counsel inquiring about the status of his petition for
11 review. (Pet'r Ex. I.) He claims he wrote two additional letters
12 to his appellate counsel; however, he does not specify when he sent
13 those letters. (Opp'n at 1.) On September 9, 2006, Petitioner
14 received his appellate counsel's response, stating:

15 I am very sorry to inform you that the California Supreme
16 Court has denied review of your case. There is nothing
17 more than can be done for you within the state court
18 system, and my scope of appointment is now at an end. I
19 am sincerely sorry that I could not be more of
assistance. I hope you have recovered well from your
heart surgery.

20 (Opp'n at 2; Pet'r Ex. II.) Petitioner claims that he assumed that
21 the state supreme court denied his petition for review on September
22 1, 2006, the date of his appellate counsel's letter. (Opp'n at 2.)
23 Petitioner thereafter requested his trial records and transcripts

24 ¹ The California Supreme Court's official website shows that the
25 petition for review was filed on July 22, 2005. The Court notes that
26 Respondent cited an incorrect filing date of July 25, 2005. (Resp't
Ex. B.)

27 ² Nowhere in the record does Petitioner elaborate on when his
28 alleged heart attack occurred or how long it took for him to recover.

1 from his appellate counsel. (Id.) Instead of the requested case
2 files, his appellate counsel sent him a box of blank civil forms on
3 January 23, 2007. (Id.) On February 21, 2007, Petitioner sent
4 another letter to his appellate counsel requesting his case files.
5 (Pet'r Ex. IV.) He also filed a motion in the Contra Costa County
6 Superior Court to obtain his trial records and transcripts, which
7 was denied on March 8, 2007. (Id.) On June 3, 2007, Petitioner
8 sent a third written request to his appellate counsel for his case
9 files. (Id.)

10 On August 8, 2007, Petitioner filed the present petition for a
11 writ of habeas corpus. Petitioner's claims include:

12 (1) ineffective assistance of trial counsel who failed to contact
13 critical defense witnesses and advised Petitioner to waive his
14 constitutional rights without informing him of the consequences of
15 doing so; (2) prosecutorial misconduct in presenting false
16 witnesses at trial; (3) the prosecution's failure to disclose a
17 promise of leniency made to a key witness; (4) the prosecution's
18 failure to disclose impeachment evidence and other information
19 material to Petitioner's defense; (5) a sentence, twenty-one years
20 to life, grossly disproportionate to the crime charged;
21 (6) instructional errors to the jury; and (7) additional claims of
22 ineffective assistance of trial and appellate counsel. (Pet. at 8-
23 15.) Petitioner also alleges that he has been denied his trial
24 records and transcripts. (Id. at 15.) He requests leave to amend
25 his petition with regard to his additional claims of ineffective
26 assistance of counsel, and he also requests appointment of counsel,
27 given his difficulty in obtaining his case files. (Id.)
28

DISCUSSION

I. Motion to Dismiss

The Antiterrorism and Effective Death Penalty Act (AEDPA) became law on April 24, 1996 and imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented the petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). However, "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." Id. § 2244(d)(2).

A state prisoner with a conviction finalized after April 24, 1996, such as Petitioner, must satisfy the AEDPA statute of limitations. See Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

1 "Direct review" within the meaning of the statute includes the
2 ninety-day period during which a criminal appellant can file a
3 petition for a writ of certiorari from the United States Supreme
4 Court, whether he actually files such a petition or not. Bowen v.
5 Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).

6 In the present case, the California Supreme Court denied
7 review on August 24, 2005. The judgment became final for purposes
8 of the AEDPA statute of limitations ninety days later, on November
9 22, 2005. See id. The one-year limitations period, therefore,
10 began to run on that date. Accordingly, Petitioner was required to
11 file a federal habeas corpus petition no later than November 22,
12 2006. See 28 U.S.C. § 2244(d). Because he did not file the
13 present federal habeas corpus petition until August 8, 2007 -- more
14 than eight months after the statute of limitations had expired --
15 the petition is untimely unless he can show that he is entitled to
16 tolling.

17 There is no statutory tolling under 28 U.S.C. § 2244(d)(2) in
18 this case because Petitioner did not file any state post-conviction
19 or collateral petitions. See 28 U.S.C. § 2244(d)(2). However, the
20 one-year limitations period can be equitably tolled because
21 § 2244(d) is a statute of limitations and not a jurisdictional bar.
22 See Beeler, 128 F.3d at 1288. "When external forces, rather than a
23 petitioner's lack of diligence, account for the failure to file a
24 timely claim, equitable tolling of the statute of limitations may
25 be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.
26 1999). Equitable tolling will not be available in most cases
27 because extensions of time should be granted only if
28 "'extraordinary circumstances' beyond a prisoner's control make it

1 impossible to file a petition on time." Beeler, 128 F.3d at 1288
2 (citation omitted). The prisoner must show that "the
3 'extraordinary circumstances' were the cause of his untimeliness."
4 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations
5 omitted). Another statement of the standard is that a litigant
6 seeking equitable tolling bears the burden of establishing two
7 elements: "(1) that he has been pursuing his rights diligently, and
8 (2) that some extraordinary circumstance stood in his way,"
9 preventing timely filing. Pace v. DiGuglielmo, 544 U.S. 408, 418
10 (2005).

11 The Ninth Circuit has said that the petitioner "bears the
12 burden of showing that this extraordinary exclusion should apply to
13 him." Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).
14 Indeed, "'the threshold necessary to trigger equitable tolling
15 [under AEDPA] is very high, lest the exceptions swallow the rule.'"
16 Id. at 1066 (quoting United States v. Marcello, 212 F.3d 1005, 1010
17 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

18 The grounds for granting equitable tolling are "highly fact
19 dependant." Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002).
20 Where a prisoner fails to show "any causal connection" between the
21 grounds upon which he asserts a right to equitable tolling and his
22 inability to file a timely federal habeas application, the
23 equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d
24 1030, 1034-35 (9th Cir. 2005), amended, 447 F.3d 1165 (9th Cir.
25 2006).

26 However, "[r]ather than let procedural uncertainties
27 unreasonably snuff out a constitutional claim, the issue of when
28 grave difficulty merges literally into 'impossibility' should be

1 resolved in [a petitioner's] favor." Lott, 304 F.3d at 920. When
2 a prisoner is proceeding pro se, his allegations regarding
3 diligence in filing a federal petition on time must be construed
4 liberally. Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006).

5 The Ninth Circuit has held that a pro se petitioner's
6 inability to access information about the statute of limitations
7 deadline, when combined with his lack of knowledge of the deadline,
8 constitutes an "extraordinary circumstance" that warrants equitable
9 tolling, provided the petitioner acted with due diligence. Id. at
10 973-74.

11 Petitioner's reference to his heart attack may be a request
12 for equitable tolling while his medical condition precluded him
13 from exercising due diligence in filing his federal habeas petition
14 on time. (Opp'n at 1.) Further, Petitioner argues that he is
15 entitled to equitable tolling until September 9, 2006, when he
16 became aware of the denial of his petition for review, because his
17 appellate lawyer failed promptly to notify him of the finality of
18 his direct appeal. (Id. at 1-2.) However, even if neither of
19 these arguments justifies equitable tolling, Petitioner is entitled
20 to equitable tolling beginning on September 9, 2006, and his
21 federal petition is timely for the reasons set forth below.
22

23 Petitioner argues that he is entitled to equitable tolling
24 from September 9, 2006, when he became aware of the state supreme
25 court's denial of his petition for review, to August 8, 2007, when
26 he filed the present federal habeas corpus petition, because his
27 appellate counsel failed to give him his trial records and
28 transcripts, despite his repeated requests for them. (Opp'n at 2.)
Indeed, he states that, at the time of the writing of his

1 opposition, his appellate counsel "has yet to provide the records
2 and transcripts that [he] requested." (Id.)

3 A habeas petitioner cannot be expected to "'prepare and file a
4 meaningful petition on his own within the limitations period'
5 without access to his legal file." Espinoza-Matthews v.
6 California, 432 F.3d 1021, 1027-28 (9th Cir. 2005) (quoting
7 Spitsyn, 345 F.3d at 801). Therefore, Petitioner's lack of access
8 to his trial records and transcripts constitutes an extraordinary
9 circumstance sufficient to warrant equitable tolling. See id.
10 (equitable tolling warranted during inmate's eleven-month stay in
11 administrative segregation because he was denied access to legal
12 papers despite his repeated requests for them); see also Lott v.
13 Mueller, 304 F.3d 918, 921-24 (9th Cir. 2002) (granting habeas
14 petitioner equitable tolling for eighty-two days he was deprived of
15 his legal materials due to two temporary transfers, despite the
16 fact that petitioner received materials shortly before the
17 limitation period was to expire).

18 The record shows that Petitioner acted diligently from the
19 time he learned that his petition for review had been denied, at
20 which point the statute of limitations had not yet run, until the
21 time he filed his federal petition. Immediately after being
22 informed of the California Supreme Court's denial of his petition
23 for review, Petitioner sought to obtain his case files from his
24 appellate counsel. (Opp'n at 2.) However, his counsel sent a box
25 of blank civil forms instead of the requested case files. (Id.)
26 Petitioner made two additional written requests for his case files,
27 but to no avail. (Id.) Petitioner still did not have access to
28 his legal materials at the time he filed his federal habeas corpus

1 petition, and at the time he wrote his opposition to Respondent's
2 Motion to Dismiss. (*Id.*) Petitioner's untimeliness did not stem
3 from his lack of diligence, but from his inability to obtain his
4 case files. When his appellate counsel was unresponsive to his
5 multiple requests for his case files, Petitioner turned to
6 alternative means. He filed a motion in the Contra Costa County
7 Superior Court requesting his case records and transcripts, but it
8 was denied. (Pet'r Ex. IV.)

9 Believing that the state supreme court's denial was issued on
10 September 1, 2006, Petitioner apparently thought the one-year
11 limitation period began running on that date. He filed the present
12 federal petition less than a year later, presumably because he was
13 attempting to file a timely petition. Furthermore, he has
14 requested the right to amend the petition because he needs his case
15 files adequately to assert his additional claims of ineffective
16 assistance of counsel. Under Roy, Petitioner's allegations
17 regarding diligence must be construed liberally. 465 F.3d at 970.
18 Therefore, the Court finds that Petitioner acted with due diligence
19 and is entitled to equitable tolling for the eleven months during
20 which he could not obtain his case files.

21 In sum, the limitations period started to run on November 22,
22 2005. Ten months later, on September 9, 2006, Petitioner learned
23 of the California Supreme Court's denial of his petition for review
24 and diligently started to pursue his claims. The limitations
25 period is equitably tolled from September 9, 2006, through August
26 8, 2007, when Petitioner filed his federal petition. Because only
27 ten months elapsed between November 22, 2005 and September 9, 2006,
28 the present petition is timely filed.

1 Accordingly, the Court DENIES Respondent's motion to dismiss
2 the federal petition as untimely.

3 II. Mixed Petition

4 In the present case, the Court notes that some of Petitioner's
5 claims are unexhausted because they were not included in his
6 petition for review to the California Supreme Court. (Resp't, Ex.
7 B.) Moreover, Petitioner concedes that he has failed to exhaust
8 his additional claims of ineffective assistance of counsel because,
9 as mentioned above, he needs his case files to pursue these claims.
10 Therefore, this action must be dismissed as a mixed petition under
11 Rose v. Lundy, 455 U.S. 509, 510 (1982).

12 Prisoners in state custody who wish to challenge in federal
13 habeas proceedings either the fact or length of their confinement
14 are first required to exhaust state judicial remedies by presenting
15 the highest state court available with a fair opportunity to rule
16 on the merits of each and every claim they seek to raise in federal
17 court. See 28 U.S.C. § 2254(b),(c); Rose, 455 U.S. at 515-16. If
18 available state remedies have not been exhausted as to all claims,
19 the district court must dismiss the petition. Id. at 510; Guizar
20 v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988). A dismissal solely
21 for failure to exhaust is not a bar to returning to federal court
22 after exhausting available state remedies. See Trimble v. City of
23 Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995).

25 Petitioner requests that he be permitted to amend his
26 ineffective assistance of counsel claim because he has not received
27 his case files. In light of Petitioner's difficulty in obtaining
28 his case files despite his diligent efforts toward that end, and

1 the fact that the present petition has been found to be timely, the
2 Court construes his request as a motion to stay these proceedings
3 in order to obtain his case files, amend his claim, and return to
4 state court to exhaust the unexhausted claims.

5 A petitioner may seek a stay of a petition pursuant to Pace,
6 544 U.S. at 416, under which he may file a protective petition in
7 federal court and ask the court to stay federal habeas proceedings
8 until all state remedies are exhausted. District courts have the
9 authority to issue stays, and the habeas statute does not deprive
10 them of that authority. Rhines v. Weber, 544 U.S. 269, 277-278
11 (2005). A stay is appropriate where the district court determines
12 that good cause existed for the petitioner's failure to exhaust his
13 claims in state court, and that such claims are potentially
14 meritorious. Id.; see also Pace, 544 U.S. at 416. However, a
15 district court must deny a petitioner a stay if the unexhausted
16 claims are "plainly meritless." Rhines, 544 U.S. at 277.

17 Here, it appears that good cause exists for Petitioner's
18 failure to exhaust his claims on direct appeal, because his claims
19 could be raised by way of state habeas corpus. This is
20 Petitioner's first habeas petition, and there is no evidence that
21 he seeks the stay for improper purposes. See Fetterly v. Paskett,
22 997 F.2d 1295, 1301-02 (9th Cir. 1993) (holding that a stay for the
23 purpose of permitting exhaustion of unexhausted claims should be
24 granted only if the claims petitioner seeks to pursue are
25 cognizable under section 2254; there is a likelihood of prejudice
26 to petitioner if the stay is not granted; and there is no evidence
27 that the motion for a stay is brought to delay, vex, or harass, or
28

1 that the request is an abuse of the writ). While Petitioner is
2 unable to assert the basis for his additional claims of ineffective
3 assistance of counsel given his lack of access to his case files,
4 the Court finds that these claims are not "plainly meritless." See
5 Rhines, 544 U.S. at 277. The phrase "plainly meritless" suggests
6 that it applies to an issue which, on its face, clearly cannot
7 succeed. For instance, claims involving only questions of state
8 law cannot be grounds for federal habeas relief. In contrast,
9 ineffective assistance of counsel claims are potentially
10 meritorious given their constitutional dimension. Accordingly, the
11 Court GRANTS Petitioner's request for a stay.

12 III. Motion for Appointment of Counsel

13 Petitioner requests appointment of counsel to help him pursue
14 his claims in federal court in light of his difficulty in obtaining
15 his case files. (Pet. at 15.)

16 The Sixth Amendment right to counsel does not apply in habeas
17 corpus actions. See Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th
18 Cir. 1986). Title 18 U.S.C. § 3006A(a)(2)(B), however, authorizes
19 a district court to appoint counsel to represent a habeas
20 petitioner whenever "the court determines that the interests of
21 justice so require" and such person is financially unable to obtain
22 representation. The decision to appoint counsel is within the
23 discretion of the district court. See Chaney v. Lewis, 801 F.2d
24 1191, 1196 (9th Cir. 1986); Knaubert, 791 F.2d at 728; Bashor v.
25 Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). The courts have made
26 appointment of counsel the exception rather than the rule by
27 limiting it to: (1) capital cases; (2) cases that turn on
28

1 substantial and complex procedural, legal or mixed legal and
2 factual questions; (3) cases involving uneducated or mentally or
3 physically impaired petitioners; (4) cases likely to require the
4 assistance of experts either in framing or in trying the claims;
5 (5) cases in which the petitioner is in no position to investigate
6 crucial facts; and (6) factually complex cases. See generally 1 J.
7 Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure
8 § 12.3b at 383-86 (2d ed. 1994). Appointment is mandatory only
9 when the circumstances of a particular case indicate that appointed
10 counsel is necessary to prevent due process violations. See
11 Chaney, 801 F.2d at 1196; Eskridge v. Rhay, 345 F.2d 778, 782 (9th
12 Cir. 1965).

13 The Court finds that appointment of counsel is not warranted
14 in this case. Petitioner's claims are typical claims that arise in
15 criminal appeals of non-capital convictions and are not especially
16 complex. This is not an exceptional case that would warrant
17 representation on federal habeas review. Therefore, Petitioner's
18 motion for appointment of counsel is DENIED.

19 This denial is without prejudice to reconsideration should the
20 Court on its own motion find an evidentiary hearing necessary
21 following consideration of the merits of Petitioner's claims.
22 Moreover, Petitioner is not precluded from renewing this motion
23 after he has examined his files and formulated his claims.
24

25 IV. Production of Petitioner's Case Files

26 Petitioner's request for appointment of counsel and his
27 request for leave to amend his claims were prompted by his
28 difficulty in obtaining his case files. Petitioner alleges that

1 the trial records and transcripts are necessary to develop his
2 additional claims of ineffective assistance of trial and appellate
3 counsel. (Pet. at 15.)

4 Petitioner states that his case files remain in the possession
5 of his appellate counsel, V. Elizabeth Grayson, and that he sent
6 letters to Ms. Grayson asking for his case files, but she sent a
7 box of blank civil forms instead. (Opp'n at 1.) Petitioner
8 unsuccessfully sought to obtain the files by filing a motion with
9 the superior court requesting these files. (Pet'r Ex. I.) Rule 3-
10 500 of the California Rules of Professional Conduct states that an
11 attorney's duty to his client includes "promptly complying with
12 reasonable requests for information and copies of significant
13 documents" Cal. R. Prof. Conduct 3-500. Thus, Petitioner
14 is entitled to have access to his case files. Accordingly, the
15 Court orders Ms. Grayson promptly to provide Petitioner with his
16 case files, and to certify to this Court that she has done so.

17 CONCLUSION

18 For the foregoing reasons,

19 1. The Court DENIES Respondent's motion to dismiss (docket
20 no. 5).

22 2. Petitioner's request to amend the petition is construed
23 as a motion for a stay, which is GRANTED. These proceedings are
24 hereby STAYED pending Petitioner's exhaustion of his state judicial
25 remedies. Petitioner must act diligently in exhausting his state
26 judicial remedies, or the stay may be lifted. He must file
27 quarterly reports describing the progress of his state court

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For the Northern District of California

1 proceedings, commencing thirty (30) days from the date of this
2 Order and continuing every ninety (90) days thereafter until his
3 state court proceedings are terminated. He must also attach to his
4 status reports copies of the cover page of any document that he
5 files with or receives from the California Supreme Court relating
6 to the claims.

7 3. The Clerk of the Court shall ADMINISTRATIVELY CLOSE the
8 file pending the stay of this action. Nothing further will take
9 place in this action until Petitioner receives a final decision
10 from the California Supreme Court and, within thirty (30) days of
11 doing so, moves to reopen the action, lift the Court's stay and
12 amend the stayed petition to add the newly-exhausted claims.

13 4. Petitioner's motion for appointment of counsel is DENIED.

14 5. Petitioner's appellate counsel is ordered to produce his
15 case files. The Clerk of the Court is directed to send a copy of
16 this Order to: Ms. V. Elizabeth Grayson, Esq., 270 Ninth Avenue,
17 San Francisco, California 94118. Ms. Grayson shall comply with
18 this Order by mailing Petitioner his case files within thirty (30)
19 days of the date of this Order, and certify to the Court that she
20 has done so. If Ms. Grayson is unable to do so, she shall submit
21 an explanation to the Court within the thirty-day deadline.

22 6. This Order terminates Docket no. 5.

23 IT IS SO ORDERED.

24 DATED: 3/10/09


CLAUDIA WILKEN
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LARRY D PETERSON,

Plaintiff,

Case Number: CV07-04069 CW

v.

KEN CLARK et al,

Defendant.

/

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 10, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Larry Dean Peterson V-22444
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E5-129u
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Corcoran, CA 93212

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Ms. V. Elizabeth Grayson, Esq.
270 Ninth Avenue
San Francisco, CA 94118

Dated: March 10, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk